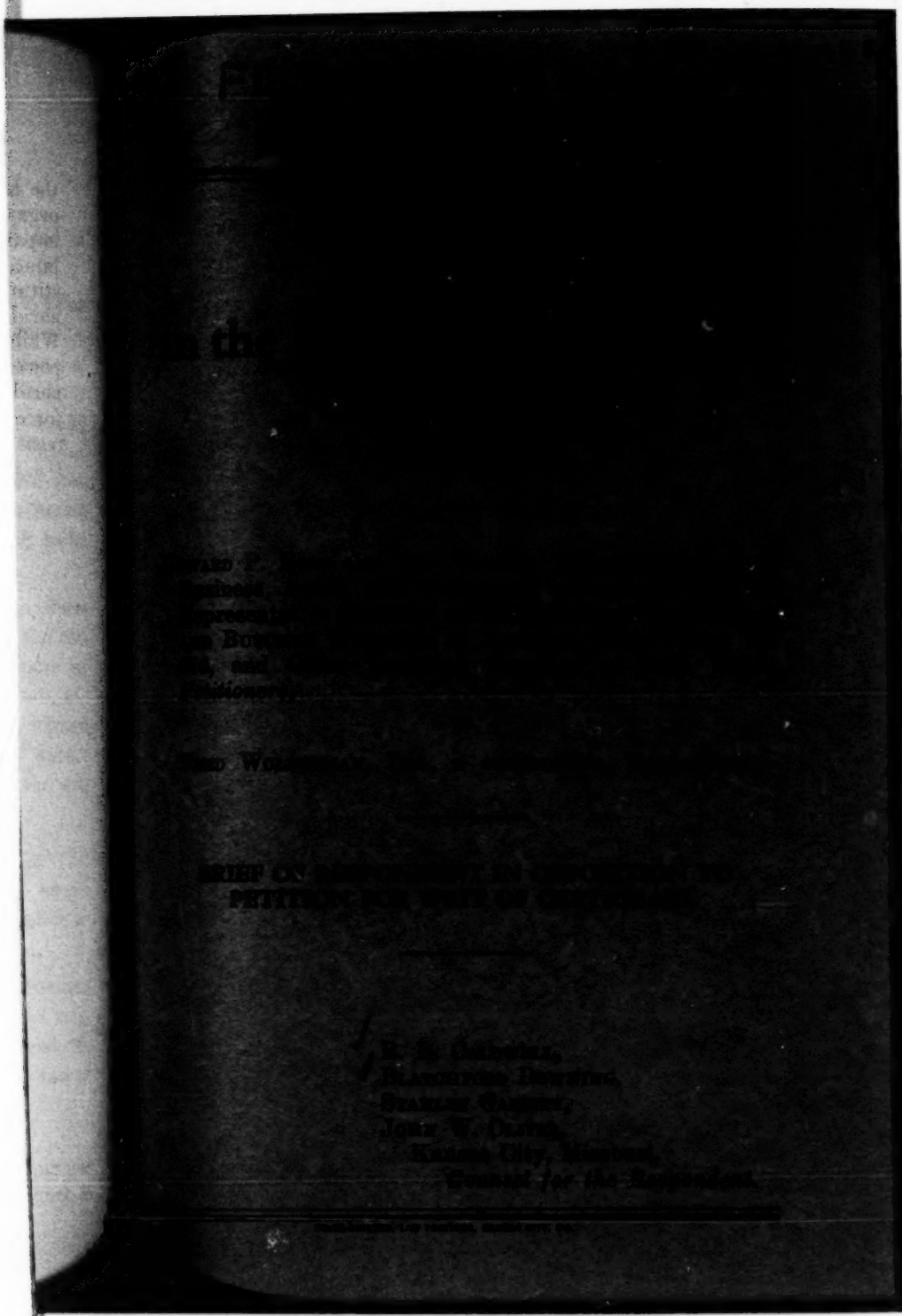

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In the Supreme Court of the United States

October Term, 1947.

HOWARD P. ROOT AND RAY THOMAS, Individually, and as Business Agent and President, respectively, and as Representative Members of AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF AMERICA, LOCAL UNION No. 576, and Other Unnamed Members of Said Union, *Petitioners,*

vs.

FRED WOLFERMAN, INC., a corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 522.

PRELIMINARY STATEMENT.

The issue here relates to the form of the final decree ordered by the Supreme Court of Missouri in an action brought by respondent, as plaintiff, to enjoin petitioners, as defendants, from picketing respondent's stores for the proven unlawful purpose of coercing respondent into violating the express terms of the National Labor Relations Act.

Respondent has never contended nor will it be contended here, that the purpose of the picketing was unlawful because it interfered with and damaged respondent's business. The effect of a picket line on respondent's business has absolutely nothing to do with whether the picketing was for a lawful or unlawful purpose.

When petitioners assert that they have "renounced" the unlawful purposes of the picketing as a premise for their right of relief here (Petition, page 5), they, at the same time, are forced to admit that the purposes of their picketing were unlawful. The record shows that petitioners never in fact renounced those unlawful purposes and the question, therefore, narrows itself to the power of a state court to enjoin picketing for proven unlawful purposes. This case simply does not involve "peaceable picketing for a lawful purpose in a labor dispute" as asserted by petitioners (Petition, page 8, 9).

QUESTIONS PRESENTED.

The actual questions presented by the record are:

1. Do the First and Fourteenth Amendments to the United States Constitution grant to petitioners the right to peacefully picket for the express proven purpose of coercing respondent into violation of the National Labor Relations Act, by (a) forcing its employees to join petitioners' union against their will (R. 140), and (b) forcing respondent to sign a closed shop contract when admittedly petitioners' union was not the lawful bargaining agent? (R. 140)

2. Does an order of the Supreme Court of Missouri enjoining picketing for such unlawful purposes violate the constitutional guaranty of free speech when there has been in fact no renunciation of the unlawful purposes of such picketing (R. 142), particularly when that order provides that it shall not prevent or hinder petitioners "from exercising their right of free speech in informing the public that plaintiff's (respondent's) butchers are not union members"? (R. 146)

STATEMENT OF THE CASE.

The most concise way to state this case is to quote the first three paragraphs of the opinion of the Supreme Court of Missouri. We have inserted in parentheses after each sentence of the Supreme Court of Missouri's statement appropriate references to the record.

Statement From Supreme Court of Missouri (R. 136-137).

"Fred Wolferman, Inc., the plaintiff, operates four retail grocery and meat markets in Kansas City (R. 114, 2, 24). It employs nineteen butchers, at least three of whom are union members (R. 115, 2, 24). Plaintiff's other employees, including the truck drivers, belong to unions (R. 117, 47). Defendants Root and Thomas are the Business Agent and President, respectively, of the Amalgamated Meat Cutters and Butcher Workers of America, Local Union No. 576 (R. 114, 2, 24). They arranged a meeting to which plaintiff's butchers were invited for the purpose of inducing them to join the union (R. 115, 48). Fifteen of the nineteen butchers attended (R. 70). They voted twelve to three against joining (R. 70). Despite the result of the vote, defendants attempted to obtain from plaintiff a closed shop contract with their union (R. 115, 6, 25). Defendants also demanded that plaintiff's executives use their influence to force their butchers into the union (R. 115, 74). Defendants threatened plaintiff that unless their demands were met they would cut off deliveries to and from plaintiff's stores, close their stores and put plaintiff out of business (R. 115, 73). There is testimony that defendants knew their demands were unlawful but told plaintiff 'with a little support on our (plaintiff's) part, no doubt the boys could be persuaded to join'

(R. 74). Plaintiff refused to sign the contract because defendants' union did not represent a majority of plaintiff's butchers and under the National Labor Relations Act plaintiff could not lawfully make the contract (R. 116, 73). Said act also prohibits plaintiff from encouraging its employees to join a particular union (R. 115). Defendants concede plaintiff is subject to the act (R. 117, 110).

Upon plaintiff's refusal of defendants' demands defendants established a 'recognized' picket line at all plaintiff's stores (R. 116, 93-95). The banner carried by the pickets incorrectly stated there was a strike, but there was no strike (R. 116, 28). A 'recognized' picket line is one which has been sanctioned by the Central Trades Union, the Teamsters Joint Council, and the Building and Construction Trades Council (R. 117, 94). All labor unions of Kansas City respect a recognized picket line and its members will not cross it (R. 117, 94). As a result union truck drivers would not deliver merchandise to plaintiff's stores, and plaintiff's truck drivers who are unionized would not deliver purchases from the stores (R. 117, 7, 25). Thus practically all supply and delivery of merchandising was shut off (R. 117, 7, 25).

Plaintiff filed a petition for an injunction to restrain the picketing on the ground it was being carried on for an unlawful purpose, namely to coerce plaintiff into signing a contract with defendants' union and to force plaintiff to coerce its butchers into joining defendants' union (R. 116, 2-16)."

Decrees of Trial Court and of Supreme Court of Missouri.

The trial court, after finding that the picketing was for an unlawful purpose (R. 120), refused to enjoin picketing for any purpose (R. 113, 29-31).

It was led into error by an inaccurate statement in petitioners' trial brief (R. 124),(1) and it determined that petitioners had in fact renounced the unlawful purposes of the picketing, and therefore expressly authorized the picketing of respondent's stores to continue (R. 121).

On respondent's appeal, the Supreme Court of Missouri examined the record, both the pleadings and the evidence, agreed with the trial court's finding that the purposes of petitioners' picketing were unlawful (R. 120), but it found that petitioners had not in fact renounced the original unlawful purposes of the picketing (R. 142), and further found as a fact that "the present purposes of the picketing are to coerce" respondent "into taking action forbidden by the National Labor Relations Act" (R. 142). It, therefore, enlarged the trial court's injunction which had enjoined the making of demands, to include an injunction against the establishment of a recognized picket line (R. 139, 146).

The order of the Supreme Court of Missouri, however, expressly provided that it should not prevent or hinder petitioners "from exercising their right of free speech" (R. 146).

---

(1) In an "Additional Memorandum for Defendants" that petitioners filed with the trial court they stated that although there "was evidence that the picketing in the beginning was for the purpose of causing the employer to sign a closed shop agreement (petitioners), in their answer specifically disclaimed any intention of future picketing for such purpose" (R. 124). Petitioners then purported to quote from their answer and erroneously stated that their answer had in fact alleged that the sole purpose of their picketing was to be "to inform the public of the fact that the meat cutters in the employ of the plaintiff are not members of the union and to thereby put economic pressure upon the employer and the said workmen with a view to causing said workmen to join the union" (R. 124-125). Petitioners' answer made no such allegation (R. 27-28). Petitioners' undisputed testimony was clear to the effect that if picketing were permitted it would be for the same unlawful purpose originally contemplated (R. 103 to 107).

The Issue Presented to and the Findings of the Supreme Court of Missouri.

The issue presented to the Supreme Court of Missouri narrowed "down to the single one whether the picketing continued to be for an unlawful purpose" (R. 139). There has never been any real dispute about the facts of this case and there has never been any question about the unlawful objectives of petitioners' original picketing.

The sole question has always been whether "defendants have, in fact, renounced their unlawful purposes in picketing plaintiff's stores as the trial court found" (R. 141).

In deciding this factual issue the Supreme Court of Missouri analyzed both the answer (R. 141) and the testimony (R. 141) and held as follows:

> "We find nowhere in the record before us, neither in any pleading nor in the evidence, any renunciation of the original purposes of the picketing, some of which the trial court found to be unlawful. Since the record shows some of the present purposes of the picketing are to coerce plaintiff, under the threat of closing its business, into taking actions forbidden by the National Labor Relations Act the picketing should be enjoined as unlawful.
>
> We hold the trial court in making its injunction order should have enjoined defendants also from picketing to the extent requested by plaintiff" (R. 142).

The Findings of Fact of the Supreme Court of Missouri Are Supported by the Record.

The findings of the Supreme Court of Missouri are clearly supported by the record. The portion of the answer

under which petitioners claimed they had renounced is quoted in full in the opinion of that court (R. 138). It is apparent that the state court's authoritative construction of this pleading is the only proper construction that may be given it. That answer expressly alleged that if petitioners were permitted to picket it would be for the express purpose of coercing "plaintiff to enter into such (referring to a closed-shop contract) contractual relations with the said union" (R. 28).

The purpose of petitioners' picketing is revealed by the testimony on pages 103 to 107 of the record where Petitioner Root testified.

When the trial court stated that it could not "see why you think you cannot publish the real truth, 'that the employees of the store are unfair to organized labor'" (R. 105) and when petitioner Root was asked if he would "be willing to put on that same banner and say 'This is to notify the public and is not to be recognized or effected or anywise affect any truck driver from attempting to deliver merchandise to this establishment'" (R. 106), he answered that "it is rather obvious that the answer is no" (R. 106).

Petitioner Root also testified that "the reason the answer to that question is obvious, is that (he was) seeking to put economic pressure on the employer" (R. 106).

And as to the purpose of that economic pressure, petitioner Root testified that "the reason why you want economic pressure on the employer is so that he will in turn put a little squeeze on the employees" and that "of course, the purpose of putting the pressure, the economic pressure on the employer * * * is you hope that through that source you will then put the squeeze on the employee and he will join your union" (R. 107).

It is, therefore, apparent that the Supreme Court of Missouri's finding that "there is no evidence of renunciation on the part of the defendants" (R. 141) is amply supported by the record.(2)

Correction of Specific Inaccuracies in Petitioners' Statement.

Pursuant to Rule 27, par. 4, we turn now to the correction of inaccuracies in the statement of the other side. The petition and brief filed by petitioners in this Court follow exactly the pattern first established in the trial court. In the trial court, by successfully misleading that court by a patent misstatement (R. 124-125)(3), petitioners were able to obtain a decision predicated upon the erroneous factual assumption that they had in fact renounced the unlawful purposes of their picketing and they were thereby able to have a case passed upon that was not in fact before that court (R. 142).

The same approach was unsuccessfully followed in the Supreme Court of Missouri because that court held that it "must take the record as the parties made it and as we find it" (R. 142).

When petitioners state to this Court that "Defendants below by answer and testimony disclaimed certain rights as follows * * *" and when they say that "defendants renounce any intention of picketing in the future for recognition as representative of the Butcher Workmen * * * and further renounced any intention of picketing to cause the plaintiff to request its butchers to join the

(2) In their motion for rehearing in the Supreme Court of Missouri petitioners in effect admit the lack of record support for the purported renunciation. They there alleged that "the Supreme Court refuses to accept such statements (referring to the 'fact' of renunciation quoted this Court on pages 5 and 6 of the Petition) because *elsewhere in the record* there is nothing to show such renunciation" (R. 151) (emphasis ours).

(3) See footnote (1), page 6 of this Brief.

union" (Petition, page 5), they do not refer this Court to petitioners' answer or to petitioners' testimony. They instead refer this Court to the reversed opinion of the trial court that they were successful in obtaining in that court by their method of misinforming it as to what their answer actually contained (R. 124).

The Supreme Court of Missouri answered the quoted statement from the trial court's opinion and also removed the base on which petitioners' "statement of fact" to this Court rests (Petition, pages 5-6) by expressly holding that "we find nowhere in the record before us, neither in any pleading nor in the evidence, any renunciation of the original purposes of the picketing * * *" (R. 142).

Without a single reference to the record, petitioners go from their erroneous premise that they have in fact purged themselves of all unlawful purposes by a purported renunciation, to the equally erroneous premise that they sought "the right to picket for *the sole purpose* of informing the public that the meat cutters at Wolferman's were not union men" (Petition, page 6, emphasis ours) and that this purpose was a "lawful purpose" (Petition, pages 8 and 9).

Petitioners' statements relating to the asserted lawful nature of their picketing and to the asserted sole purpose of their picketing all stem from their refusal and failure to state to this Court that the Supreme Court of Missouri refused to follow petitioners' unique interpretation of their answer and testimony as it had appeared in their memorandum to the trial court, and that it felt itself bound to "take the record as the parties made it and as we find it. We may not read into it something it does not contain and which contradicts its express allegations" (R. 142).

The Supreme Court of Missouri Did Not Enjoin the Picketing Because it Damaged Respondent.

Petitioners attempt to have this Court infer that the Supreme Court of Missouri enjoined petitioners' picketing because that picketing might result in damage to respondent's business (See their description of the "questions presented," Petition, page 8). Petitioners likewise assert as a "controlling fact from the record" (Petition, page 4) that the Supreme Court of Missouri "enjoined the defendants from peaceably picketing * * * if such picketing 'would affect, destroy, or interfere with the receipt and delivery of merchandise to and from plaintiff's stores * * *'" (Petition, page 6). The same effort to confuse is made in paragraph A of the specification of errors intended to be urged (Brief, page 11) and a similar attempt is apparent from the innuendo of the argument that "the fact that peaceable picketing may most certainly interfere with the conduct of business * * * does not change otherwise lawful picketing into illegal conduct" (Brief, page 19).

The Supreme Court of Missouri simply did not enjoin peaceful picketing because it found that petitioners' picketing would affect or destroy respondent's business. It enjoined petitioners' picketing because the purposes of petitioners' picketing were "clearly unlawful * * * under the National Labor Relations Act" (R. 140) in that it was carried on "for the purpose of obtaining a contract, and * * * for the purpose of coercing plaintiff to force its employees to join the union" (R. 139-140) and because even if a single lawful purpose was coupled with those unlawful purposes, "the fact that one of several purposes is lawful does not make the picketing lawful" (R. 141).

The Supreme Court of Missouri utilized the only available method it had to prevent petitioners from coercing

respondent into violating the National Labor Relations Act. (R. 141). It did nothing more.

The order of the state court as authoritatively construed by that court provides that petitioners shall not be prevented from exercising their right of free speech to inform the public that respondent's butchers have freely voted not to join petitioners' union (R. 146). The inevitable damage caused by any picket line was not in any way considered or discussed by the Supreme Court of Missouri as a basis or reason for its decision.

SUMMARY OF THE ARGUMENT.

This Court, in the exercise of its jurisdiction, deals with the cases that come before it on the basis of the facts disclosed by the record. It does not consider nonexistent or assumed circumstances.

The question presented to this Court by the record is whether a state court is prohibited by the Constitution from preventing petitioners from carrying out their proven unlawful purpose of coercing respondent into violating the National Labor Relations Act by enjoining petitioners from picketing for such purpose, particularly when the order of such state court specifically requires that such order shall not prevent or hinder petitioners from exercising their right of free speech.

The Supreme Court of Missouri, in deciding the actual question presented by the record in the negative, decided that constitutional question in a way that is in accord with the decisions of this Court.

Freedom of speech, just as the other freedoms specifically mentioned in the First Amendment, is not an absolute freedom. It does not guarantee that one may say anything at any time, anywhere.

Peaceful picketing under some circumstances has been identified with the right of free speech, because speech is sometimes involved in peaceful picketing. But this Court has held that peaceful picketing is more than free speech.

The fact that peaceful picketing is more than free speech renders it subject to more restrictions than free speech standing alone. The mere circumstance that a labor dispute occasions the exercise of free speech does not give that freedom any greater constitutional protection than that to which it might be otherwise entitled.

When coercion to force an unlawful act is added to peaceful picketing then that peaceful picketing involves more than free speech and is therefore subject to state limitation.

The Supreme Court of Missouri enjoined the coercive effect of a picket line that was established for the proven unlawful purpose of forcing respondent to violate the law but it expressly permitted petitioners to exercise their right of free speech.

This Court should reject petitioners' invitation to read a new clause covering peaceful picketing into the Constitution by denying the pending application for the writ of certiorari.

ARGUMENT.

Introduction.

"This court is without power to give advisory opinions • • • It has long been its considered practice not to decide abstract, hypothetical or contingent questions • • • or to decide any constitutional question except with reference to the particular facts to which it is to be applied • • •," *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461, and cases cited therein.

In this case, just as in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132, "the petitioner • • • secks to bar all regulation by contending that regulation in a situation not presented would be invalid" (l. c. 132 of 301 U. S.).

Throughout their petition and throughout their brief, petitioners attempt to give this Court the impression that the picketing that was enjoined was picketing that was "for a lawful purpose" (Petition, pages 6, 8 and 9; Brief, pages 11, 12, 19, 21 and 23).

Petitioners elaborately quote from the reversed memorandum opinion of the trial court and base their case upon an assumed renunciation that the Supreme Court of Missouri expressly held (R. 141-142) had never been made (Petition, page 5-6).

It is perfectly apparent that the question presented to this Court is not whether the Supreme Court of Missouri has power to "enjoin • • • peaceable picketing for the sole purpose of informing the public that employees of the employer picketed are non-union men • • • when the picketing is otherwise lawful" (Petition, page 8, Question I). Nor is it the question of whether the Supreme Court

of Missouri has power to enjoin "lawful picketing" or "peaceable picketing for a lawful purpose" (Petition, page 9, Questions II, III and IV). Nor can the Supreme Court of Missouri be convicted of error on the theory that it enjoined "peaceable picketing for a lawful object • • • or for a lawful purpose" (Brief, pages 11 and 12, Specifications A to E, inclusive), or that it enjoined picketing because the picketing caused damage to respondent (Petition, pages 4, 6, 8; Brief 11, 19, 21).

The record shows that the Supreme Court of Missouri only enjoined picketing for unlawful purposes and preserved to petitioners their full right to exercise their acknowledged right of free speech (R. 146). It also shows that the element of damage to respondent's business was not a factor in the state court's decision (R. 136-146).

The Purposes of Petitioners' Picketing Were Unlawful.

Respondent admittedly is "subject to the provisions of the National Labor Relations Act" (R. 160).

The trial court correctly found that prior to the picketing the petitioners sought to have respondent enter into a closed-shop agreement even though the union admittedly did not represent a majority of the employees in the bargaining unit and that "thereupon the defendants urged the plaintiff's said representatives to attempt to persuade said employees to join said local union" (R. 115). The trial court correctly found that respondent refused to do either because both actions would be in violation of the National Labor Relations Act (R. 115). That they would cannot be doubted. See sections 8(2), 8(3), 8(5) and 9(a) of the Act (29 U.S.C.A. §§ 158(2), 158(3), 158(5) and 159(a).

The Supreme Court of Missouri sustained both findings (R. 139-140) because both findings were clearly supported

by the record (R. 4, 25, 73, 75, 76, 106, 107). The reliance of the Supreme Court of Missouri upon the decision of this Court in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, and the footnote below make further elaboration unnecessary.(4)

Petitioners do not deny, and have never denied, that peaceful picketing for unlawful purposes may be enjoined without doing violence to the Constitution. Petitioners' whole theory of presentation of the case at bar to this Court rests upon the false grounds that (a) the Supreme Court of Missouri in fact enjoined picketing that had a lawful purpose, and (b) that the purposes of petitioners' picketing were lawful because they had in fact renounced their unlawful objectives.

On petitioners' own theory, their case collapses the moment that this Court determines that the Supreme Court of Missouri correctly found that there was no renunciation of petitioners' unlawful purpose of coercing respondent into violating the law.

The method used to eliminate the factor that petitioners concede will defeat them is to attempt to have this Court consider the case as though that factor was not even involved.

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(4) Petitioners have never attempted to contest the proposition that both of their original demands were unlawful in that they attempted to force respondent to violate the National Labor Relations Act. On page 8 of their brief in the Supreme Court of Missouri they frankly stated that the proposition that "picketing, the objective of which is to compel an employer to enter into contractual relations with a labor union, which does not represent a majority of the workers, is for an unlawful objective, and can be enjoined" was "an issue which is not before this Court in this appeal." Similarly, on the same page of their brief in the state court, petitioners stated that the proposition that "picketing with the objective of forcing an employer to urge his employees to join a union is unlawful as in violation of the National Labor Relations Act and should be enjoined" likewise was "not an issue here and we do not intend to take up the time of this Court commenting upon any such cases." Petitioners, in the Supreme Court of Missouri, as they do here, based their entire hope of sustaining the trial court upon the same renunciation theory that they attempt to present to this Court. In both courts of review they proceed without benefit of record references and with complete ignoration of the facts as revealed by the record.

Petitioners, for a third time, ask a court to ignore the record as made by the pleadings and the evidence and to accept from their brief their unsupported statements as to what the record actually shows on the cardinal issue of renunciation. The whole pattern of their presentation is designed to establish, without record support and in direct contradiction of that record, that a renunciation was in fact actually made in this case. Absent a renunciation, petitioners concede that they cannot argue about picketing for a lawful purpose or picketing for the sole purpose of informing the public.

Any accurate statement of the facts, based on the record, demonstrates that there was no renunciation.

The question therefore presented by the record must ignore any purported renunciation. It may be stated as follows: Does the Constitution of the United States prohibit the Supreme Court of Missouri from preventing petitioners from carrying out their proven and unlawful purpose of coercing respondent into violating the National Labor Relations Act by enjoining petitioners from peaceful picketing for that proven purpose, particularly when the order of the Supreme Court of Missouri specifically requires that such order shall not prevent or hinder petitioners from exercising their right of free speech?

The Supreme Court of Missouri, by answering the actual question presented by the record in this case in the negative, decided that question in accord with the applicable decisions of this Court.

Freedom of Speech Is Not an Absolute Right.

Without dissent, this Court in *Bakery & Pastry Drivers and Helpers Local 802* v. *Wohl*, 315 U. S. 769, 775, held that "a state is not required to tolerate in all places and all circumstances even peaceful picketing by an individ-

ual." The dissent in *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, 738, states the same thought by holding that "we do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing" and the majority opinion in that case makes clear that "the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable" because "to hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma" (l. c. 725 and 728 of 315 U. S.).

Petitioners' contentions in this case to the effect that "peaceable picketing • • • is the exercise of freedom of speech • • • not only may such rights not be denied but they may not be materially abridged, impaired or conditioned" (Brief, page 13) and "peaceable picketing • • • is an exercise of constitutional right that cannot be abridged by the legislature or by a court" (Brief, page 15) are not tenable because basically they must rest upon the unsustainable proposition that peaceful picketing is no more than freedom of speech and that freedom of speech is an absolute freedom.

Apart from the proposition that peaceful picketing is not the equivalent of freedom of speech, it is likewise clear that even the exercise of freedom of speech is not an absolute right.

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571, this Court unanimously held that "it is well understood that the right of free speech is not absolute at all times and under all circumstances."

This expression echoes Mr. Justice Holmes' trumpet blasts against dogma sounded in the classic cases. In *Frohwerk* v. *United States*, 249 U. S. 204, 206, he stated for the unanimous court "that the First Amendment,

while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language * * * We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech." (5)

Mr. Justice Holmes' most quoted phrase from *Schenck* v. *United States,* 249 U. S. 47, is undoubtedly his statement that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic" (l. c. 52 of 249 U. S.), but as far as this case is concerned the sentence that follows that phrase and the authority that is relied upon is of more direct application.

Immediately following the "shouting fire" phrase, Mr. Justice Holmes stated that "it (the most stringent protection of free speech) does not even protect a man from an injunction against uttering words that may have the effect of force," citing with approval Mr. Justice Lamar's opinion in *Gompers* v. *Buck's Stove & Range Co.,* 221 U. S. 418, 439.

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(5) That Mr. Justice Holmes used "the counseling of murder" merely as an example of counseling the violation of any law is apparent from his opinion in *Fox* v. *Washington,* 236 U. S. 273. The defendant in that case unsuccessfully urged that the Constitution gave him the right to speak out against officials who were enforcing the State of Washington's laws against indecent exposure by breaking up a nudist colony. He encouraged and incited those that "went into the woods * * * with merely the clothes that nature gave them" to persist in the violation of the state law until a newspaper campaign could force the officials "to come to see the brutal mistake of their action and so inform the people." Characteristically, Justice Holmes disassociated this Court from "the wisdom of the defendant, the prosecution, or the act" and held that "All that concerns us is that it cannot be said to infringe the Constitution of the United States." Counseling murder and counseling the violation of laws against complete dishabille are poles apart from a factual viewpoint, but neither is protected by the Constitution. By the same token it cannot be said that "counseling" the violation of the National Labor Relations Act is a constitutional right.

In the *Gompers Case,* Mr. Justice Lamar, speaking for the entire court, which included Mr. Justice Holmes, stated on page 439 (the page relied upon by Mr. Justice Holmes in the *Schenck Case*) held that "the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inhering in the words themselves, and, therefore, exceeding any possible right of speech which a single individual may have."

What Mr. Justice Holmes and what Mr. Justice Lamar both had in mind is that picketing invokes more than the mere exercise of free speech. This very practical fact was recognized by petitioners when they established their single picket at the back door of respondent's Walnut street store, outside of the public view (R. 107), and it likewise has been fully recognized by this Court.

Peaceful Picketing Is More Than Free Speech.

Mr. Justice Douglas' concurring opinion in the *Wohl Case* clearly states the proposition. It was there held that:

> "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." (l. c. 776 of 315 U. S.)

Thomas v. *Collins,* 323 U. S. 516, divided the Court into four groups, but on the basic theory under discussion, all of the present members of the Court are shown to be in accord.

Mr. Justice Rutledge, delivering the opinion of the Court, compared the cases involving employers' attempts to persuade employees with respect to joining or not joining unions and noted, citing *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, that "When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. * * * Of course, espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause" (l. c. 537-538 of 323 U. S.).

Mr. Justice Douglas, speaking for Mr. Justice Black and Mr. Justice Murphy, paraphrased the language quoted above from the *Wohl Case* by holding in a concurring opinion that "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee."

And Mr. Justice Jackson, in concurring, held that "Free speech on both sides and for every faction on any side of the labor relation is to me a constutional and useful right" but he likewise recognized that more than free speech is involved "if the employees or organizers associate violence or other offenses against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidations" and that in such cases, the speech may constitutionally be enjoined to extent necessary.

National Labor Relations Board v. *Virginia Electric & Power Co.*, 314 U. S. 469, demonstrates that the addition of a lawful course of conduct, such as the exercise of free speech disassociated with any other factor, to an unlawful

course of conduct, such as restraint or coercion, does not cleanse or protect the unlawful activity, but that the lawful action loses its immunity from regulation by reason of its contamination with the unlawful purpose. Pouring white paint into a bucket of black does not make the mixture white. The Supreme Court of Missouri held just that in this case when it determined that when an assumed lawful purpose "is coupled, as it is here, with unlawful purposes, the fact that one of the several purposes is lawful does not make the picketing lawful" (R. 141).

The *Virginia Electric & Power Co. Case* held that "conduct, though evidenced in fact by speech, may amount in connection with other circumstances to coercion * * *. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally * * * may no more be disregarded than pressure exerted in other ways * * *. The mere fact that language merges into a course of conduct does not put that whole course without the range of otherwise applicable administrative power" (l. c. 477-478 of 314 U. S.).

This Court's recognition of the economic fact that picketing is more than free speech is consistent with its recognition that employer's bulletins and employer's speeches in connection with labor disturbances are frequently not made in isolation but that they must necessarily be considered "as part of a pattern of events adding up to the conclusion of domination and interference," *Virginia Electric & Power Co.* v. *National Labor Relations Board,* 319 U. S. 533, 539 (on the second appeal).

It is as sophistic for an employer to contend that an anti-union speech the night before an election, accompanied with some coercive acts, is but the exercise of free speech as it is for a union to contend that all it is

doing when it establishes a recognized picket line for an unlawful purpose is to but exercise its right of free speech. Petitioners in the case at bar recognized this fact when they established only one picket in a "back alley where trucks made deliveries and not out in front of the store to notify the public" (R. 107). Coercion to force respondent to act regardless of the law (R. 73-74) was what petitioners sought and that is what they would have obtained except for the order of the state court.

Coercion to Force a Violation of the National Labor Relations Act Involves More Than the Mere Exercise of Free Speech.

In none of the cases in which this Court has sustained a claim of constitutional protection to picketing has it even so much as intimated that picketing for unlawful purposes is but the exercise of freedom of speech. In fact, in such decisions, this Court has carefully stated that it was not so holding. And the various state courts over the country have interpreted the decisions of this Court in that light. See cases cited in the opinion of the Supreme Court of Missouri (R. 142, 145).

In the eight cases decided by this Court and cited by petitioners on page 13 of their brief, peaceful picketing was enjoined in two cases, *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, and *Carpenters Union* v. *Ritter's Cafe,* 315 U. S. 722. In the others cases this Court was careful not to substitute peaceful picketing as an absolute and inviolable constitutional right in the stead of freedom of speech.

From *Senn* v. *Tile Layers Protective Union,* 301 U. S. 468, 480, in which Mr. Justice Brandeis was careful to note that the peaceful picketing sustained in that case involved "no effort to induce Senn to do an unlawful act,"

to *Cafeteria Employees Union* v. *Angelos*, 320 U. S. 293, 295, in which this Court stated that "continuing representations unquestionably false and acts of coercion going beyond the mere influence exerted by the fact of picketing, are, of course, not constitutional prerogatives," this Court has always recognized that peaceful picketing for unlawful purposes is not constitutionally protected.

Petitioners do not and cannot cite a single case from this or any other court which holds that peaceful picketing to coerce the violation of law is but the exercise of free speech. Actually petitioners do not claim that such a case exists, but they seek to have that very proposition applied by attempting to lead this Court into believing that the state court in fact found that the purpose of their picketing was lawful, but that it enjoined the picketing because it caused damage. The record shows that the Supreme Court of Missouri did neither.

The Supreme Court of Missouri, thirty-five years before this Court had announced the doctrine, recognized the kinship between freedom of speech and peaceful picketing (R. 140). See cases cited on page 140 of the record. (6)

The Supreme Court of Missouri has never departed from its judicial attitude in connection with the identification of freedom of speech with peaceful picketing. In *Rogers* v. *Poteet*, 355 Mo. 986, 1008, 199 S. W. (2d) 378, 393, certiorari denied by this Court, 331 U. S. (Prelimi-

(6) The isolated case of *Park & Tilford Import Corp.* v. *International Brotherhood of Teamsters*, 27 Cal. (2d) 620, 165 P. (2d) 891, decided by the sharply divided Supreme Court of California, and relied upon by petitioners in all three courts, was not overlooked by the Supreme Court of Missouri (R. 145). The Constitution of the United States does not require that either this Court or the Supreme Court of Missouri adopt any particular public policy declared by the Supreme Court of California. That the law of California is consistent with the law declared by this Court and by the Supreme Court of Missouri, see *James* v. *Marinship Corporation et al.*, 25 Cal. (2d) 721, 155 P. (2d) 329, in which it was held that "a state may impose limitations upon picketing or other concerted action if the 'end sought' is not permissible under state law and public policy."

nary Print—Number 4) 847, the Supreme Court of Missouri remanded that case with directions to redraft the decree because "appellants have a constitutional right by peaceful picketing and persuasion and means not involving violence, intimidation and coercion to advocate the cause of their Union and thereby advance their own interests."

And still more recently, on January 12, 1948, the Supreme Court of Missouri in *Ex parte Hunn* and *Ex parte LeVan*, Nos. 40660 and 40671 (not yet published, 21 L. R. R. M. 2212), held that Section 8 of the so-called Madison Labor Act (Missouri Revised Statutes Annotated, Section 10178.208), which provided that "* * * if any person shall picket * * * when no labor dispute exists between such employer and his employees or their representatives he shall be guilty of a misdemeanor," was unconstitutional because that act purports "to abolish the right, not the abuse of free speech as an incident of picketing unless a labor dispute exists * * *. The statute, insofar as it attempts to forbid any and all picketing when no labor dispute exists, is unconstitutional and void."

The Decree in This Case Preserves Petitioners' Right of Free Speech.

The Supreme Court of Missouri specifically noted that the decree sought by respondent (R. 127-129) did not seek to enjoin the "picketing in its entirety" (R. 146). That court held that "the order it is seeking would not prevent or hinder defendants from exercising their right of free speech in informing the public that plaintiff's butchers are not union members" (R. 146). This gloss is respected by this Court. See *Hotel & Restaurant Employees, Local No. 122*, v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 441. It is apparent that petitioners could advise the public that respondent's em-

ployees freely voted not to join petitioners' union by telling everyone that went into respondent's store that this was a fact or this information could "be displayed upon a billboard, published in a newspaper or made by an individual without fear of punishment, regardless of the existence or nonexistence of any labor dispute" *Ex parte Hunn, supra.*

Under the decree in this case the petitioners are perfectly free to use all of the usual avenues of speech to disseminate all the information they want to give the public, but they may not add to and join with that speech the action that is automatically induced by the very presence of a recognized picket line to coerce respondent into violating the National Labor Relations Act.

In *Dorahy* v. *Kansas,* 272 U. S. 306, 311, Mr. Justice Brandeis, over twenty years ago, recognized that concerted union activity could be "illegal because of its purpose, however orderly the manner in which it is conducted." He also recognized that "the right to carry on business—be it called liberty or property—has value" and that "to interfere without just cause is unlawful." A picket line proven to be established for an unlawful purpose is not a just cause. And the identification of free speech with peaceful picketing does not make a picket line merely an exercise of free speech. It is still a picket line and it is still more than free speech.

The decree of the Supreme Court of Missouri follows the theory established by this Court in the cases above discussed.

No Right of Peaceful Picketing Is Guaranteed by the First Amendment.

Petitioners basically claim that they have constitutional protection for "more than speech" (l. c. 776 of 315 U. S.).

Throughout their petition and their brief they consistently refer to an asserted "constitutional right • • • peaceably to picket" (Petition, pages 6, 9), and they repeatedly assert that "for a court to enjoin peaceable picketing • • • if for a court to deny to labor its constitutional rights" (Brief, pages 15, 19, 21, 22, 23). What petitioners basically contend is that they have an unlimited and constitutional right to picket for any purpose, lawful or unlawful.

Picketing is made up of exercising speech, which is constitutionally free, and a lot of other things that are not constitutionally free, but which require justification before they may be lawfully exercised. See *Dorchy* v. *Kansas*, 272 U. S. 306, 311.

When petitioners' argument is stripped of all its verbiage it stands naked as a bold invitation to this Court for it to write into the Constitution a protection that is not there. It asks this Court to hold that peaceful picketing is the exact equivalent of free speech and that the Constitution must be read so as to include peaceful picketing among the activities protected by the Constitution.

Adkins v. *Children's Hospital*, 261 U. S. 525, 545, based its determination upon "an unconstitutional interference with the freedom of contract included with the guaranties of the due process clause." Mr. Justice Holmes' protest against "the dogma, Liberty of Contract" and his point that "contract is not specially mentioned in the text that

we have to construe" (l. c. 568 of 261 U. S.) went unheeded until *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 391, recognized that "the Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."

The Constitution does not speak of freedom of peaceful picketing any more than it speaks of freedom of contract.

Petitioners are protected by the decree of the Supreme Court of Missouri in exercising their rights as guaranteed them by the Constitution. They are not protected in going beyond the exercise of those rights in their proven efforts to coerce the respondent into a violation of law.

This Court has not held that the Constitution may be used as a cover for such action and the decision of the Supreme Court of Missouri so holding decided that question in accord with decisions of this Court.

Conclusion.

For the reasons above stated, we respectfully submit the application for the writ of certiorari should be denied.

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